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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 738

CHARLES H. DENNY, *et ux*, DOROTHY MAE DENNY,
PETITIONERS,

VERSUS

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on December 17, 1948 (R. 27), and in which order denying rehearing was entered January 21, 1949 (R. 38).

OPINIONS BELOW.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 27-30) is reported in 170 F. (2d) at page 365.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals was entered December 17, 1948 (R. 27-30). The order denying the rehearing was entered January 21, 1949 (R. 38). The jurisdiction of this Court is invoked under Section 1254, subsection 1, Title 28, United States Code, as amended September 1, 1948.

QUESTIONS PRESENTED.

Whether the failure of an officer, not the commanding officer of the Brooke General Hospital at Fort Sam Houston, Texas, an agency of the respondent, to dispatch an ambulance to transport the petitioner, Dorothy Mae Denny, to said Hospital for medical attention during childbirth, and failure to furnish the necessary hospital and medical services to said petitioner at the time of the birth of her child, from which she suffered damages by reason of neglect, is exempted from liability under the law as a mere discretionary function, and whether respondent owed petitioners a duty to provide them with medical attendance and ambulance service, when the respondent had a furnished ward for such purposes and it was practicable to do so.

STATUTES AND REGULATIONS INVOLVED.

Title 10, Section 96, *United States Code* reads as follows:

"Medical attendance for families of officers and men. The medical officers of the Army and con-

tract surgeons *shall* whenever *practicable* attend the families of the officers and soldiers free of charge."

Army Regulation No. 40-505, Paragraph 2, Section b, Sub-section 3, reads as follows:

"Whenever *practicable*, the wife, dependent children, and servants of persons enumerated in "b" (1) above; also other dependent members of the family when residing with such persons provided they are not legally dependent upon an individual not in the military service."

Title 28, Section 2674 of the *United States Code* reads as follows:

"2674. LIABILITY OF THE UNITED STATES.

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act of omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

Title 28, Section 2680, Sub-section (a), of the *United States Code*, reads as follows:

"2680. EXCEPTIONS.

"The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

STATEMENT.

The petitioners, Charles H. Denny and wife, Dorothy Mae Denny, brought this suit under the provisions of the law relating to Tort Claims, to recover damages because of the alleged negligence of respondent in failing to furnish an ambulance to transport petitioner, Dorothy Mae Denny, to the Brooke General Hospital, an Agency of the respondent, and in failing to furnish the necessary hospital and medical services at the time of the birth of petitioners' child, and that as a result of such negligence, plaintiff's child was born dead and as a result petitioners sustained damages, the allegations being in broad and general terms, petitioners being prepared to show that petitioner, Dorothy Mae Denny, has been nervous and up-set ever since said incident and her health impaired. (R. 2-4).

Respondent filed a motion to dismiss the complaint on the grounds: (1). That respondent's agents were exercising, performing or failing to exercise or perform a discretionary function; and (2). Because as a matter of law respondent owed no duty to petitioners to provide them with medical attendance or service (R. 4-5).

The District Court sustained respondent's motion to dismiss and peremptorily dismissed the action (R. 12).

The Court of Appeals affirmed the judgment of the District Court (R-27-30).

Thereafter, on January 6, 1949, petitioners filed their petition for rehearing (R. 32-37), and on January 21, 1949, rehearing was denied (R. 38).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1). In overruling and not sustaining petitioners' 1st assignment of error because the Trial Court erred in sustaining the respondent's motion to dismiss petitioners' complaint.

(2). In overruling and not sustaining petitioners' 2nd assignment of error because the Trial Court erred in sustaining the respondent's motion to dismiss petitioners' complaint, when as a matter of law the hospital at Fort Sam Houston was provided by the United States of America for the purpose of taking care of maternity cases such as petitioners', and it was both practicable and customary for the medical officers, employees, and attendants of said hospital to attend officers' and soldiers' wives who were pregnant, up to and including childbirth.

(3). In overruling and not sustaining petitioners' 3rd assignment of error because the Trial Court erred in sustaining the respondent's motion to dismiss petitioner's complaint, when as a matter of law under the statutes of the United States the medical officers of the Army and said hospital at Fort Sam Houston were under obligation to attend Mrs. Dorothy Mae Denny, because it was practicable for them to do so at said time, in that the hospital was equipped and prepared for the purpose of caring for such cases, and it therefore becomes a fact question to be submitted and heard on the merits.

(4). In overruling and not sustaining petitioners' 4th assignment of error because the Trial Court erred in sus-

taining respondent's motion to dismiss petitioner's complaint, because if the evidence would show that it was practicable for the medical officers and hospital to attend the petitioner, Mrs. Dorothy Mae Denny, then they could not use their discretion and it was not a discretionary function as to whether or not they would attend her, and they could not refuse to do so, and said matter therefore became a fact question to be submitted on the merits.

(5). In overruling and not sustaining petitioners' 5th assignment of error because the Trial Court erred in refusing to hear evidence and not permitting petitioner to submit evidence on the hearing in connection with respondent's motion to dismiss petitioners' complaint, because if the evidence would show that the hospital at Fort Sam Houston was prepared by the United States Government and equipped by the United States Government for the purposes of such cases and of delivering the baby of Mrs. Dorothy Mae Denny, and that it provided a special ward for such patients, for the express purpose of completely and fully taking care of officers' wives and wives of enlisted men, and that it was both practicable and customary for the medical officers, attendants, and employees of the Army at said hospital to attend said wives up to and including childbirth, then under the laws and statutes of the United States the medical officers of the Army and said hospital were under obligation to so attend her, because it was practicable for them to do so, and they could not use their discretion and it was not a discretionary function of an individual officer to fail and refuse to do so.

(6). In overruling and not sustaining petitioners' 6th assignment of error because the Trial Court erred in overruling and not sustaining Petitioners' Motion for a New Trial and Re-Statement of the Case because it is alleged clearly in said Motion for a New Trial and Re-Statement

of the Case that the officers, attendants, and hospital at Fort Sam Houston were under obligation to take care of Mrs. Dorothy Mae Denny since it was both practicable and customary for such maternity cases to be handled at the hospital and the officers and hospital attendants could not use their discretion and it was not a discretionary function of theirs under the circumstances to pass upon said matter.

(7). In overruling and not sustaining petitioners' 7th assignment of error because the Trial Court erred in overruling Petitioners' Motion for a New Trial and Re-Statement of the case because as a matter of law under the facts alleged therein the Court should have granted the new trial and permitted petitioners to file their First Amended Complaint which was tendered in connection therewith.

(8). In overruling and not sustaining petitioners' 8th assignment of error because the Trial Court erred in refusing to grant Petitioners' Motion for a New Trial which clearly shows that it was both practicable and customary, and not a discretionary function as to whether or not petitioner's wife should be taken care of at the Fort Sam Houston Hospital when Mrs. Dorothy Mae Denny gave birth to said child.

(9). In holding that "any negligent breach of duty on the part of Army medical authorities which may have existed, in failing to extend promptly the gratuitous medical services requested, clearly could not have resulted in any actionable damage," under the facts and circumstances in this case.

(10). In holding that "the liability of the United States under the Federal Tort Claims Act does not extend to cases where, as here, injury results from the failure to perform a mere discretionary function of duty, even though the discretion involved be abused", under the facts and circumstances in this case.

(11). In holding that the original complaint is a suit by petitioners to recover damages for the negligent death of their child when said complaint on its face shows as follows: "Petitioners say that as a result of the negligence and carelessness of the respondent they have been damaged in the sum of Fifty Thousand Dollars (\$50,000.00), together with interest, reasonable attorney's fees and court costs, and for general and special relief," in that said allegation is a general allegation for all damages sustained by reason of said negligence, and petitioners were prepared to show that Mrs. Dorothy Mae Denny has been nervous and upset ever since said accident, and that her health has been impaired, all due to the negligence of the respondent, its officers, employees and attendants.

REASONS FOR GRANTING THIS WRIT.

(1). The Court of Appeals exceeded its authority in holding that the original complaint was a suit by petitioners to recover damages for the negligent death of their child because said complaint on its face shows that as a result of the negligence and carelessness of the respondent, they sustained damages, said allegation being a general allegation for all damages sustained by reason of said negligence, and petitioners were prepared to show that Dorothy Mae Denny has been nervous and upset ever since said incident and her health has been impaired.

The original complaint filed in this cause is broad and general in its terms. Respondent never at any time called upon petitioners to allege specifically in what manner and in what particulars they were damaged.

(2). The decision of the Court of Appeals is erroneous in sustaining the action of the District Court in peremptorily dismissing petitioners' complaint without hearing any evidence.

Title 10, Section 96, of the United States Code, provides that medical officers of the Army and contract surgeons *shall* wherever *practicable* attend the families of the officers and soldiers free of charge. Petitioners were prepared to show that it was not only practicable but actually for many months prior thereto such Army surgeons at the Brooke General Hospital at Fort Sam Houston, Texas, had in fact attended petitioner, Mrs. Dorothy Mae Denny and rendered her medical services and advice.

We are not concerned with whether petitioners, after a hearing, would have been entitled to damages. We are concerned only with the question of whether the respondent's officer not the commanding officer was exercising and performing or failing to exercise and perform a discretionary function vested in it by law and regulation, and secondly, whether the respondent under the attendant circumstances owed any duty to petitioners to provide Dorothy Mae Denny with medical attendance and medical and hospital service and ambulance service during such childbirth. Petitioners were in a position to prove at said time that during the entire period of pregnancy Dorothy Mae Denny made frequent trips to the aforesaid Hospital where she was given medical treatment, attendance and supervision in the preparation for said childbirth; that she was assured by respondent's agents, servants and employees that they would continue to take care of her and render her all medical and hospital treatment and supervision until after the child was born; that petitioner, Charles H. Denny, was an officer in the United States Army; that said Hospital is maintained by respondent; that a ward therein was provided for maternity cases; that it was not only practicable, but universally customary for said Hospital to furnish such treatment and supervision to officers' and soldiers' wives who were pregnant up to and including childbirth.

It is elementary that the use of the word "shall" in connection with the third person makes it mandatory for the Army surgeons to render such service when "practicable." If it was mandatory for such officers to render such service, then, of course, it was not a discretionary function. Petitioners were ready, able and willing to show that it was not only practicable but universally customary for said Hospital to have rendered such services and were further prepared to show after much delay and dilatory tactics, and after the child died, that said Hospital actually dispatched two ambulances for the purpose of taking petitioner, Dorothy Mae Denny, to said Hospital for treatment. Therefore, petitioners submit that it was practicable for respondent to have furnished such medical treatment and since the furnishing of such service was mandatory, it could not have been discretionary.

Prior to the passage of the Tort Claims Act, the Congress was confronted with the considering and disposing of private claims against the Government. Congress, in waiving immunity from Tort liability, fixed the basis to be "*under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred.*" It is a universal rule that if a physician abandons a case without giving his patient such notice and opportunity to procure the services of another physician, such conduct subjects him to the consequences and liability resulting from the abandonment of the case. Petitioners were prepared to show that at the critical stage of the case the Army surgeons abandoned or at least neglected the case, causing the injuries to Dorothy Mae Denny's health.

CONCLUSION.

For the reason stated, it is respectfully submitted that this application for a writ of certiorari should be granted.

Respectfully submitted,

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